

0A103 - J78

**IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO**

HOPE ACADEMY	:	
BROADWAY CAMPUS, <i>et al</i>	:	Case No. 10CVC 05 7423
	:	
Plaintiffs	:	
	:	JUDGE BENDER
v.	:	
	:	
	:	
WHITE HAT MANAGEMENT,	:	
LLC, <i>et al</i>	:	
	:	
Defendants	:	

**AMICUS BRIEF OF DAVE YOST,
OHIO AUDITOR OF STATE**

Auditor of State Dave Yost respectfully submits the following Amicus Brief to address questions raised by the Court in its Journal Entry dated October 21, 2011. The Auditor is the elected State Official charged with enforcing the provisions of Revised Code Chapter 117, including the auditing of public agencies. R.C. §§117.02 and 117.10.

I. Summary of the Issues

In Count Three of the Complaint, the Plaintiffs (ten community/charter schools), ask the Court to order an accounting of funds received by Defendant White Hat, the entity they hired to manage the operations of their schools. On October 21, 2011, the Court issued a Journal Entry which posed three questions for the parties:

0A103 - J79

(1) Does the Auditor of State have exclusive jurisdiction over financial audits of public entities, such that this Court lacks subject matter jurisdiction?

(2) Does the Court lack subject matter jurisdiction by virtue of the Auditor's certification that White Hat complied with its reporting obligations under R.C. §3314.024?

(3) Can the Court order the Auditor to conduct a special audit as a means of resolving this dispute?

For ease of analysis, the Auditor will address the three questions in reverse order.

II. Background: The Statutory Framework Governing Audits of Public Offices

Pursuant to R.C. §117.10, the Auditor of State is *required* to audit all public offices, and has *discretion* to audit the accounts of private entities that receive public money. *Oriana House, Inc. v. Montgomery*, 108 Ohio St.3d 419, 2006 Ohio 1325, at ¶ 14. The community school Plaintiffs all qualify as “public offices,” as that term is defined in R.C. §117.01(D). *See Cordray v. Int’l Preparatory Sch.*, 128 Ohio St.3d 50, 2010 Ohio 6136, at ¶ 22. The community schools are audited annually. See R.C. §117.11; AOS Bulletin 2000-005 (March 8, 2000), at p. 3 (citing OMB Circular A-133, *Audits of States Local Governments, and Non-Profit Organizations*).

Defendant White Hat provides management services to the various schools, pursuant to contract. The Auditor has not directly audited White Hat’s books to ensure White Hat is complying with its obligations. The General Assembly has provided that a management company situated like the Defendant is to “provide a detailed accounting including the nature and costs of the services it provides to the community school.” R.C. §3314.024 (hereinafter “the

0A103 - J80

Statute”).¹ The school must then include this information in a footnote to the financial statements it submits to the Auditor. *Id.*

The Revised Code does not elaborate on what information a management company has to provide to the school to satisfy the Statute’s requirement of a “detailed accounting.” On October 27, 2004, the Auditor issued Bulletin 2004-009 to clarify the subject. The Auditor instructed that the Footnote “should list management company expenses during the year by object codes (e.g. salaries, supplies, etc.),” meaning the codes used in the Uniform Schools’ Accounting System. AOS 2004-009, p. 2.

There is no dispute that the Auditor has performed its mandatory annual audits on all these schools; that the schools all included the required Footnote regarding management expenditures; and that in each case, the Auditor concluded the Footnotes satisfied the requirements of the Statute.

The Plaintiffs wish to receive more information from White Hat than White Hat submitted for purposes of preparing the Footnote. It is the Auditor’s understanding that the plaintiffs have proposed three possible mechanisms for securing additional information: (1) the Court could order the Auditor to perform a special audit of White Hat; (2) the Court could find that White Hat has failed to comply with the Statute and order White Hat to provide a supplemental accounting based on that authority; or (3) the Court could order White Hat to

¹ This reporting requirement only applies to management companies that receive more than twenty percent of the school’s annual gross revenues. The parties agree that White Hat meets this threshold and so is subject to this reporting requirement.

0A103 - J81

provide an accounting based on the contract between White Hat and the schools and/or the common law. The Auditor will address each possibility in turn.

III. Legal Argument

A. **The Court Cannot Order The Auditor To Conduct A Special Audit.**

As previously noted, the Auditor has already performed its mandatory annual audits of the schools. The Auditor's remaining authority is *discretionary*: the auditor of state "may" conduct an audit of a public office at any time upon his own initiative or when requested to do so by the public office. R.C. §117.11(B). The Auditor also has discretionary authority to audit the accounts of private entities that receive public money. R.C. §117.10.

Generally, the way in which one compels a public official to undertake a specific action is by way of a writ of mandamus, and it is well-established that (absent an abuse of discretion), mandamus cannot compel a public official to act in a certain way on a discretionary matter. *State ex rel. Evans v. Columbus Dept. of Law* (1998), 83 Ohio St.3d 174, 175, 699 N.E.2d 60. Use of the word "may," rather than "shall," indicates that the official has discretion as to whether or not to perform the act, and therefore mandamus will not lie. See, e.g., *Fasone v. Clinton Township* (10th Dist.), 1993 Ohio App. LEXIS 5589, at * 3.

Courts have recognized that judicial interference with the free exercise of a discretionary authority committed to the executive branch would violate the separation of powers. *Gosney v. Board of Elections* (7th Dist.), 1989 Ohio Ap. LEXIS 1168, at * 6. For this reason, the Auditor

0A103 - J82

of State respectfully submits that an order from this Court compelling the Auditor to conduct a special audit of White Hat or to re-open a previously completed audit would be unlawful.

B. The R.C. §3314.024 Footnote Requirement Is Neither Preclusive Nor A Legal Basis For Plaintiffs To Demand Additional Information From White Hat.

The next question is what effect the Auditor's certification of the Footnote has. White Hat contends that the Court is bound by that certification, such that it lacks jurisdiction to order further relief. ODE disputes this contention and even goes so far as to suggest that R.C. §3314.024 creates a private cause of action the schools can use to compel an accounting. The Auditor respectfully disagrees with both assertions.

Despite the use of the phrase in the statute, R.C. §3314.024 does not actually require a management company to provide a "detailed accounting" to the schools it services. The statute says:

[a] management company ... shall provide a detailed accounting including the nature and costs of the services it provides to the community school. *This information* shall be included in the footnotes of the financial statements of the school and be subject audit.

R.C. §3314.024 (emphasis added). When read together, the two sentences make clear that the *sole* purpose of the required "accounting" is to allow the school to prepare the Footnote for the Auditor's review, *not* to aid the school in conducting an independent evaluation of how the management company is using its resources. (If the statute existed for the benefit of the schools, there is no logical reason why it should only apply to certain management companies, rather than to any management company that receives payment for services from a community school).

As noted above, the Auditor has indicated -- by way of Bulletin 2004-009 -- what information the Footnote must contain. Therefore, if one reads the two sentences in R.C.

0A103 - J83

§3314.024 together, it is clear that the "detailed accounting" need only include "this information," meaning the information demanded by the Auditor. It necessarily follows that if the Auditor is satisfied with the information in the Footnote, then the management company has met its statutory obligation to provide "this information," and the school has no statutory right to demand additional information.

This analysis compels three conclusions. First, contrary to ODE's suggestion, R.C. §3314.024 does not create a private right of action in favor of the schools. Ohio courts use a three-part test to determine whether a statute creates an implied cause of action: (1) whether the statute creates a right in favor of the plaintiff; (2) whether there is any legislative intent, explicit or implicit, to create or deny a remedy through private right of action; and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy. *Anderson v. Smith* (10th Dist.), 2011 Ohio 5619, at ¶ 10 (citing *Strack v. Westfield Cos.* (1986), 33 Ohio App.3d 336, 337 and *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 435). Applying that test, it is clear that there is no private right of action: there is no indication of an intent to create a private cause of action, and since the purpose of the statute is to obtain information for the Auditor's use, allowing such a suit to proceed in circumstances where the Auditor is satisfied with the information he has would not further the purposes of the statute.

Second, the Plaintiff schools have no standing -- and the court no jurisdiction -- to order the Auditor to re-open the Audits he has already certified. Not only would such an order offend the separation of powers, as noted above, it would also ignore the fact that R.C. §3314.024 exists to help the Auditor's oversight of the schools. Once the Auditor certifies his satisfaction with the Footnote, the school is "off the hook," that is, it faces no further risk of sanction from the Auditor for failing to meet its reporting requirements. And in the absence of a risk of harm, it has no

0A103 – J84

standing to seek relief in court. *Hoerig v. Tiffin Scenic Studios, Inc.* (3rd Dist.), 2011 Ohio 6103, 2011 Ohio App. LEXIS 4999, at ¶ 21 (citing *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560 (to have standing, a party must have an actual or imminent injury)).

Third, the Auditor's certification of the Footnote's sufficiency does *not* foreclose the possibility of this Court ordering an accounting under some other legal theory. Simply stated, the certification by the Auditor and the accounting sought by the Plaintiffs differ in their scope and their ends. Matters outside the scope of these or any audits performed by the Auditor are precisely that – outside the scope. A financial audit, such as performed on the Plaintiff schools, is designed to assess risk, evaluate internal controls and test those controls. It is designed to assess legal compliance. It is not a special audit, which uses forensic techniques to search of misfeasance or malfeasance. Nor is a financial audit a performance audit, designed to determine whether services are provided efficiently, or whether the policy goals have been reached.

These other types of audits are expensive and time-consuming, and are undertaken only in certain situations. In particular, a Special Audit is undertaken only upon approval of the Auditor's Special Audit Task Force, upon a showing of particularized facts supporting a need for the work. No such facts have been presented to the Auditor.

Should the Plaintiff schools wish to reach such matters outside the scope of the financial audit, they will have to find a legal basis to do so other than the statute.

C. R.C. 117.10 Does Not Necessarily “Occupy The Field”

White Hat contends that the General Assembly has established a comprehensive statutory process for evaluating the propriety of public expenditures, such that this Court has no jurisdiction to hear this action.

0A103 - J85

The "statutory process" of which White Hat speaks is the procedure by which the Auditor issues "Findings for Recovery." A "Finding for Recovery" means the Auditor has concluded, in an audit report, that public money has been illegally expended, collected but not accounted for, or left uncollected when due, or that public money or property has been converted or misappropriated. R.C. § 9.24(H)(3). The issuance of a Finding for Recovery by the Auditor has two effects: (1) the person against whom the Finding is issued is barred from all contracts with the state or political subdivisions so long as the Finding remains unresolved (subject to certain statutory exceptions), R.C. § 9.24(A); and (2) upon receipt of the Audit report, the affected public official has 120 days to file suit to recover the funds. R.C. §117.28. White Hat would have the Court conclude that this procedure is the only method by which public funds can be recouped.

However, the weight of authority is to the contrary. First, the Ohio Attorney General has issued a formal opinion that R.C. §117.28 is not the exclusive method for recovering state funds. See O.A.G. Opinion 2007-010 (May 23, 2007), at p. 11 (Secretary of State has discretion to seek refund of salary overpayments pursuant to R.C. §131.02 and R.C. §131.03, even in the absence of a Finding for Recovery from the Auditor).

Second, numerous courts have held that R.C. §117.28 does not create the exclusive mechanism for evaluating and recouping public funds. *Gibbs v. Greenfield Exempted Vill. Sch. Bd. of Ed.* (4th Dist.), 2001 Ohio 2638, 2001 Ohio App. LEXIS 6016, at * 22-23 (citing *Green Local Teachers Assn. v. Blevins* (1987), 43 Ohio App.3d 71, 74). The most that could be said is that R.C. 117.10 is an exclusive process where there is no independent alternative at law. Whether such other, independent authority may exist at statute or in the common law is a matter for the Plaintiffs to assert and this Court to decide.

0A103 - J86

IV. Conclusion

In summary, it is the opinion of the State Auditor that the Court can exercise jurisdiction to order an accounting of White Hat based on its contractual obligations and/or common law fiduciary duties to the Plaintiffs, but that the Court cannot issue an order pursuant to R.C. §3314.024. In addition, it is the opinion of the Auditor of State that under no circumstances may the Court invalidate the audits that have already been done by this office, order those audits re-opened, or compel the Auditor to perform a special audit of White Hat.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

/s/ Aaron D. Epstein

Aaron D. Epstein (0063286)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872 – Phone
(614) 728-7592 – Fax
aaron.epstein@ohioattorneygeneral.gov

Attorney for Amicus Curia
Ohio Auditor of State Dave Yost

0A103 - J87

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Amicus Brief of Dave Yost, Auditor of State* was served electronically this 12th day of December, 2011 upon:

James D. Colner, Esq.
Shumaker, Loop, & Kendrick
Suite 2400
41 South High Street
Columbus, OH 43215

Charles Saxbe
Chester, Wilcox, & Saxbe
65 East State Street
Columbus, Ohio 43215

Karen S. Hockstad, Esq.
Smith Haughey Rice & Roegge
Suite 400
213 South Ashley
Ann Arbor, Michigan 48104

Todd R. Marti, Esq.
Ohio Attorney General's office
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

/s/ Aaron D. Epstein

Aaron D. Epstein □
Assistant Attorney General